Juara Serata Sdn Bhd v Alpharich Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-42–07 OF 2013(Q)
RAUS SHARIF PCA, AHMAD MAAROP, APANDI ALI, RAMLY ALI AND AZAHAR MOHAMED FCJJ
8 SEPTEMBER 2015

Contract — Terms — Arbitration clause — Building contract required parties to refer disputes to architect/consultant for decision before arbitrating same if no decision made or if either party aggrieved by decision — Employer unconditionally took over possession of project site after inspection and architect had certified works fully completed and issued interim payment certificate — Employer refused to pay amount in interim certificate contending works done were defective — Employer never advised contractor or architect at any time that works were defective and required to be remedied — Whether employer's failure to adhere to dispute-resolution clause resulted in architect's decision becoming final and binding — Whether dispute-resolution clause did not contravene s 29 of the Contracts Act 1950 by either barring or limiting any party from enforcing its legal rights

The High Court had ordered the appellant to pay the respondent RM1.2m for works the latter had carried out under a building contract and had dismissed the appellant's counterclaim for, inter alia, damages for allegedly making good defective works. The project's architect had certified the RM1.2m as due and payable under an interim payment certificate issued ten months after the defects liability period ended. The architect also certified that the building project was fully completed. The appellant unconditionally accepted the handing over of the completed project after its representatives and the respondent's viewed the status of work done at the construction site. However, it later refused to pay the interim certificate amount contending that the works done by the respondent were not in accordance with the contract or that there were defective works and that the appellant had to engage third parties to carry out uncompleted works or remedy defective ones. In allowing the respondent's claim under the interim certificate, the High Court held that at all material times the appellant never expressed its dissatisfaction over the architect's certification nor questioned his decision; neither were instructions issued to the respondent either by the appellant or the architect to remedy alleged defective work. The Court of Appeal ('the COA') upheld the decision holding, inter alia, that the appellant failed to adhere to the dispute-resolution mechanism agreed to between the parties in cll 16–17 of the contract which provided that any dispute first had to be referred to the architect/consultant for a decision and if no decision was made or the decision was unacceptable, it then had to be

arbitrated. The appellant appealed to the Federal Court against the COA's decision.

Held, dismissing the appeal:

(1) The courts below did not commit any error in taking the approach that the parties were bound by the terms of the contract to follow the dispute-resolution process under cll 16–17 of the agreement. Under those clauses, the parties were required to refer their dispute first to the architect/consultant for a decision and thereafter to refer the dispute to arbitration if no decision was given by the architect/consultant within 14 days or if either party was aggrieved by the decision. Both clauses read together provided for the legal consequence that, if the aggrieved party failed to refer the dispute on the decision of the architect/consultant to arbitration within the stipulated time, the decision became final and binding on the parties. It was wrong to allow the appellant to resile from the agreement and benefit from its own wrong or default in failing to refer the dispute on the decision of the architect to arbitration pursuant to cll 16–17 (see paras 28–29).

(2) The issue raised by the appellant as to the validity and enforceability of the interim payment certificate was a non-issue. This was a plain case where the parties were called upon to honour their part of the bargain when they entered into the agreement. The real issue here was whether parties to a contract breached the terms they had agreed to (see para 30).

(3) Clauses 16–17 of the agreement did not contravene s 29 of the Contracts Act 1950. The arbitration agreement under those clauses did not impose any absolute restriction on or expressly oust the jurisdiction of the court (see para 33).

(4) The High Court was justified in dealing with the appellant's counterclaim for monies spent to remedy defective works as falling under cl 7.2 and in dismissing it on the ground there were no written instructions from the appellant or the architect concerning the defects or other faults. This aspect of the appellant's counterclaim was clearly unfounded (see para 35).

[Bahasa Malaysia summary

Mahkamah Tinggi telah memerintahkan perayu membayar responden RM1.2 juta untuk kerja-kerja yang telah dijalankan oleh responden di bawah satu kontrak bangunan dan telah menolak tuntutan balas perayu untuk, antara lain, ganti rugi kerana dikatakan memperbaiki kerja-kerja yang defektif. Arkitek projek itu telah mengesahkan RM1.2 juta itu sebagai kena dibayar dan boleh dibayar di bawah sijil bayaran sementara yang dikeluarkan sepuluh bulan selepas tempoh liabiliti kecacatan tamat. Arkitek juga mengesahkan bahawa projek bangunan telah siap sepenuhnya. Perayu tanpa syarat telah menerima

pengambilalihan projek yang siap itu selepas wakil-wakilnya dan responden meneliti status kerja yang telah dilakukan di tapak pembinaan. Walau bagaimanapun, ia kemudian enggan membayar jumlah sijil sementara dengan menegaskan bahawa kerja-kerja yang dijalankan oleh responden tidak menurut kontrak atau bahawa terdapat kerja-kerja yang defektif dan bahawa perayu telah melantik pihak ketiga untuk melakukan kerja-kerja yang tidak siap atau membaiki yang mana defektif. Dengan membenarkan tuntutan responden di bawah sijil sementara, Mahkamah Tinggi memutuskan bahawa pada setiap masa matan perayu tidak pernah menyatakan ketidakpuasannya terhadap pengesahan arkitek ataupun mempersoalkan keputusannya; juga tiada arahan telah dikeluarkan kepada responden sama ada oleh perayu atau arkitek untuk memperbaiki kerja defektif yang dikatakan itu. Mahkamah Rayuan ('MR') telah mengesahkan keputusan yang dibuat dengan memutuskan, antara lain, bahawa perayu telah gagal untuk mematuhi mekanisme penyelesaian pertikaian yang dipersetujui antara pihak-pihak dalam fasal-fasal 16–17 kontrak yang memperuntukkan bahawa apa-apa pertikaian perlu terlebih dahulu dirujuk kepada arkitek/perunding untuk satu keputusan dan jika tiada keputusan dibuat atau keputusan itu tidak diterima, ia kemudian perlu menimbang tara pertikaian. Perayu telah merayu kepada Mahkamah Persekutuan terhadap keputusan MR itu. Mahkamah Tinggi telah memerintahkan perayu membayar responden RM1.2 juta untuk kerja-kerja yang telah dijalankan oleh responden di bawah satu kontrak bangunan dan telah menolak tuntutan balas perayu untuk, antara lain, ganti rugi kerana dikatakan memperbaiki kerja-kerja yang defektif. Arkitek projek itu telah mengesahkan RM1.2 juta itu sebagai kena dibayar dan boleh dibayar di bawah sijil bayaran sementara yang dikeluarkan sepuluh bulan selepas tempoh liabiliti kecacatan tamat. Arkitek juga mengesahkan bahawa projek bangunan telah siap sepenuhnya. Perayu tanpa syarat telah menerima pengambilalihan projek yang siap itu selepas wakil-wakilnya dan responden meneliti status kerja yang telah dilakukan di tapak pembinaan. Walau bagaimanapun, ia kemudian enggan membayar jumlah sijil sementara dengan menegaskan bahawa kerja-kerja yang dijalankan oleh responden tidak menurut kontrak atau bahawa terdapat kerja-kerja yang defektif dan bahawa perayu telah melantik pihak ketiga untuk melakukan kerja-kerja yang tidak siap atau membaiki yang mana defektif. Dengan membenarkan tuntutan responden di bawah sijil sementara, Mahkamah Tinggi memutuskan bahawa pada setiap masa matan perayu tidak pernah menyatakan ketidakpuasannya terhadap pengesahan arkitek ataupun mempersoalkan keputusannya; juga tiada arahan telah dikeluarkan kepada responden sama ada oleh perayu atau arkitek untuk memperbaiki kerja defektif yang dikatakan itu. Mahkamah Rayuan ('MR') telah mengesahkan keputusan yang dibuat dengan memutuskan, antara lain, bahawa perayu telah gagal untuk mematuhi mekanisme penyelesaian pertikaian yang dipersetujui antara pihak-pihak dalam fasal-fasal 16 dan 17 kontrak yang memperuntukkan bahawa apa-apa pertikaian perlu terlebih dahulu dirujuk kepada arkitek/perunding untuk satu keputusan dan jika tiada

keputusan dibuat atau keputusan itu tidak diterima, ia kemudian perlu menimbang tara pertikaian. Perayu telah merayu kepada Mahkamah Persekutuan terhadap keputusan MR itu.

Diputuskan, menolak rayuan:

(1) Mahkamah bawahan tidak melakukan apa-apa kesilapan dalam membuat pendekatan bahawa pihak-pihak adalah terikat dengan terma-terma kontrak itu untuk mengikut proses penyelesaian pertikaian di bawah fasal-fasal 16–17 perjanjian. Di bawah fasal-fasal itu, pihak-pihak dikehendaki merujuk pertikaian mereka terlebih dahulu kepada arkitek/perunding untuk satu keputusan dan kemudian untuk merujuk kepada timbang tara jika tiada keputusan diberikan oleh arkitek/perunding dalam tempoh 14 hari atau jika mana-mana terkilan dengan keputusan itu. Kedua-dua fasal jika dibaca bersama memperuntukkan akibat perundangan bahawa, jika pihak yang terkilan gagal merujuk pertikaian tentang keputusan arkitek/perunding kepada timbang tada dalam masa yang ditetapkan, keputusan itu menjadi muktamad dan mengikat ke atas pihak-pihak itu. Ia adalah salah untuk membenarkan perayu membingkas daripada perjanjian dan mendapat manfaat daripada kesalahan atau kegagalannya sendiri kerana gagal merujuk pertikaian tentang keputusan arkitek itu kepada timbang tara menurut fasal-fasal 16 dan 17 (lihat perenggan 28–29).

(2) Isu yang ditimbulkan oleh perayu berhubung kesahan dan penguatkuasaan sijil bayaran sementara itu bukan satu isu. Ini suatu kes biasa di mana pihak-pihak dipanggil untuk menepati pelaksanaan bahagian mereka apabila mereka memasuki perjanjian itu. Isu sebenar di sini adalah sama ada pihak-pihak kepada kontrak itu telah melanggar terma-terma yang telah dipersetujui oleh mereka (lihat perenggan 30).

(3) Fasal-fasal 16–17 perjanjian tidak bertentangan dengan s 29 Akta Kontrak 1950. Perjanjian timbang tara di bawah fasal-fasal tersebut tidak mengenakan apa-apa sekatan mutlak ke atas atau dengan jelas menyingkir bidang kuasa mahkamah (lihat perenggan 33).

(4) Mahkamah Tinggi wajar dalam pengendalian tuntutan balas perayu untuk wang yang dibelanjakan untuk meremedikan kerja-kerja yang defektif kerana terangkum di bawah fasal 7.2 dan kerana menolaknya atas alasan tiada arahan bertulis daripada perayu atau arkitek berkenaan keadaan defektif atau sebab-sebab lain. Aspek tuntutan balas perayu ini jelas tidak berasas (lihat perenggan 35).]

Notes

For cases on arbitration clause, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7117–7118.

Cases referred to

Beaufort Developments (N1) Ltd v Gilbert-Ash (N1) Ltd (1998) 59 ConLR 66, HL (refd)

Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd [1996] MLJU 275; [1997] 4 AMR 3315, HC (refd)

Robins v Goddard [1905] 1 KB 294, CA (refd)

Standard Charted Bank Malaysia v City Properties Sdn Bhd [2007] MLJU 581; [2008] 1 CLJ 496, HC (refd)

Legislation referred to

Contracts Act 1950 s 29

Courts of Judicature Act 1964 s 78 (1)

Appeal from: Civil Appeal No Q-02–2010–2011 (Court of Appeal, Putrajaya).

Colin Lau (Yong Sie Mee with him) (Loke, King, Goh & Partners) for the appellant.

Mekanda Singh Sandhu (Satinder Singh Sandhu with him) (Sandhu & Co) for the respondent.

Raus Sharif PCA:

INTRODUCTION

[1] This appeal relates to a claim by the respondent, Alpharich Sdn Bhd, (plaintiff in the High Court) under a building contract for payment under an interim certificate and for additional works. It also involves a counterclaim by the appellant, Juara Serata Sdn Bhd (defendant in the High Court) for damages for defective workmanship and for making good the construction defects, and liquidated and ascertained damages for delay in the completion of the project.

[2] The High Court allowed the plaintiff's claim for the amount of RM1,202,500 under the interim certificate with interest thereon, but dismissed the claim for additional works. The High Court also dismissed the defendant's counterclaim.

[3] On 15 October 2012 the Court of Appeal dismissed the defendant's appeal.

[4] Leave to appeal was granted to the defendant by this court on 3 June 2013 on the following questions of law:

Question 1

Whether the Federal Court has jurisdiction to consider/review the decision of the court or courts below based on the erroneous ground that a defence has not been pleaded and in the result refused to consider the same: and/or where the defence has been fully canvassed in court despite an arbitration agreement but refused to consider the same?;

Question 2

Whether the court can review the validity of a certificate or decision made by a contract administrator relating to a dispute or difference arising between the parties to a construction contract, pursuant to a provision contained therein which provides that such a certificate or decision shall be final and binding between the parties unless referred to arbitration?

Question 3

Whether a provision requiring a contractor to make good defective works within a specified Defects Liability Period in a construction contract precludes the recovery of damages by the employer under the common law and/or the Contracts Act 1950?

[5] We heard the appeal on the 21 May 2015 and adjourned the matter for decision. We now give our decision and reasons for the same.

BACKGROUND FACTS

[6] The background facts have been sufficiently set out in the judgment of the High Court, the Court of Appeal and fully expanded in the submissions of the parties. For the purpose of this appeal, it suffices to outline merely in summary from the salient major facts bearing on this dispute.

[7] By a letter of award dated 22 September 2004 ('letter of award'), the defendant was appointed by the Ministry of Defence (MINDEF) as a camp operator for the National Service Program at the Proposed Pusat Latihan Khidmat Negara, Kern Unity at 32nd Mile, Jalan Kuching, Serian Sarawak ('Unity Camp'). The appointment required the defendant to prepare all the infrastructure, training elements and facilities, tools and instruments as per the schedule of compliance for the Unity Camp.

[8] By an agreement between the defendant and the plaintiff dated 28 March 2005 ('agreement'), the defendant appointed the plaintiff as the sole and exclusive contractor to construct and complete the Unity Camp in accordance with the terms and conditions therein on a turnkey basis with a completion date of 31 May 2005. Under the agreement, the defendant as the employer was to pay the plaintiff a consideration sum of RM4,950,000 'upon certification by the client that the works have been duly completed' (cl 2 of the agreement).

[9] Being a turnkey project, the plaintiff as the contractor was obliged to

design as well as to construct the project. An architect was appointed by the plaintiff as required under the agreement.

[10] On 11 June 2005, the architect pursuant to cl 7.1 of the agreement, duly certified, vide certificate of practical completion, that the works were practically completed on the 7 June 2005. The defendant had unconditionally accepted the handing over of the completed works, and had operated the site for the PLKN.

[11] Before accepting, a site inspection was conducted by the architect on 16 January 2006 in the presence of the plaintiff and the defendant's representatives to determine the status of the building works, with a site valuation report produced. The works were confirmed as 100% completed, but a 'building defect list' was prepared as well, which included 'sagging roof', 'roof leakage', 'sagging ceiling', 'apron crack' and 'ponding at toilet and bathroom areas', with a notation: 'Detail Investigation is required at all *Blok Kediaman Pelatih* to determine the soundness of roof Structure for occupancy'.

[12] On 21 November 2006 the architect issued the interim payment certificate, ie interim payment certificate No 1 for the sum of RM1,202,500. The sum of RM1,202,500 was arrived at on the basis of work done as at 21 November 2006, on the agreed contract sum of RM4,950,000 less previous payments made to plaintiff (RM3,500,000) and less retention sum of 5% (RM247,500).

[13] This interim certificate was issued under cl 8 of the agreement, in particular, cl 8.1 which reads:

> 8.1 Within Seven (7) days of receiving the Statement of Work Done,the architect/consultant shall issue an interim certificate (hereinafter referred to as 'the interim certificate') to the Employer (with a copy to the Contractor) stating the amounts to which the Contractor is, in the architect/consultant's opinion, entitled in respect of each of the amounts stated in the Statement of Works done.

[14] Clauses 8.2 and 8.3 provide for the retention by the employer of the 5%, and cl 8.4, the payment of interest at 1% per month calculated on a day to day basis from the due date (date of receipt of the interim certificate) until payment.

[15] It was evident that the interim certificate was issued after the expiry of the defects liability period that had ended ten months earlier.

[16] The defendant denied that the plaintiff had completed the works in accordance with the agreement and averred that the certificate of practical

completion by the plaintiff's architect was not acceptable to the defendant, the Ministry of Defence and its financier, Affin Bank Bhd. The defendant averred that the plaintiff had failed to carry out the works in accordance with the agreement, in that, it had failed to appoint the consultants or professionals as required by the Ministry of Defence. The defendant also averred that the works carried out by the plaintiff were 'not done in a good workmanlike manner and/or of a standard suitable for the known requirements of the Ministry of Defence'.

[17] With the said reasons, the defendant decided not to pay for the sum as certified in the interim certificate No 1. Consequently, the plaintiff initiated proceedings in the High Court for the sum of RM1,202,500 as well as for a sum for the additional work done. In response, the defendant counterclaimed against the plaintiff for the sum of RM 1,338,459.44 as special damages, ie the sums expended on third parties to complete the works and to remedy the defects which the plaintiff was obliged to complete under the agreement.

AT THE HIGH COURT

[18] As stated earlier, the High Court allowed the plaintiff's claim on the interim certificate but not its claim for additional works. The High Court also dismissed the defendant's counterclaim. The learned trial judge held, inter alia, that:

(a) PW2, a practising architect in Jurubina Unireka appointed by the plaintiff under cl 22.4 of the agreement testified that pursuant to cl 7.1, he issued the certificate of practical completion on 11 June 2005 wherein it was stated that the works under the agreement were practically completed on 8 June 2005 and pursuant to cl 8.1 he certified the sum of RM1,202,500. PW2 said that the defendant did not show that it was dissatisfied with the decision he had made in the two references by the plaintiff under cl 16.1 because the defendant did not refer the matters to arbitration under cl 17. The various excuses for non-payment of the amount certified by PW2 as set out in the pleaded defence were non-starters by virtue of cl 16.2 as none was referred to PW2 under cl 16 nor was the decision of PW2 in respect of his certificate for payment; and

(b) in the absence of any written instructions from the defendant or PW2 to the plaintiff concerning defects or other faults in the works, the defendant's counterclaim for liquidated and ascertained damages pursuant to cl 6 of the agreement was ill-conceived because the proviso to cl 6 itself required PW2 to first issue a certificate of non-completion which PW2 did not. (see *Lion Engineering Sdn Bhd v Pauchuan Development Sdn Bhd* [1996] MLJU 275; [1997] 4 AMR 3315 and *Standard Charted Bank Malaysia v City Properties Sdn Bhd* [2007] MLJU 581; [2008] 1 CLJ 496).

AT THE COURT OF APPEAL

[19] The Court of Appeal dismissed the defendant's appeal. The Court of Appeal held that:

(a) there was a failure by the defendant to resort to the mechanism provided under cl 17 in the event of a dispute on the certification, namely to refer the dispute to arbitration;

(b) the defendant was bound by the terms of the agreement and it had failed to adhere to the dispute resolution mechanism agreed by the parties; and

(c) the High Court had not plainly erred in law, or on the facts, to warrant appellate intervention. The High Court was not departing from the established law on the status and validity of interim certificates, and the function and responsibilities of the architect/consultant as the certifier. The challenge to the validity of the interim certificate and the exercise of the responsibilities and duties of the architect should have been properly brought before the arbitral tribunal as stated in the agreement.

AT THE FEDERAL COURT

Submissions

[20] Learned counsel for the defendant submitted that the learned trial judge erred in his finding that the defence relating to the validity and enforceability of interim certificate No 1 was not pleaded and consequently refused to consider the same. Learned counsel emphasised that the contrary to be true for the same was pleaded in very clear terms at para 8 of the defence and counterclaim. The error on the pleading point had resulted in the High Court misdirecting itself and refusing to consider the issue which had occasioned a serious miscarriage of justice.

[21] Learned counsel for the defendant also submitted that the Court of Appeal erred when it assumed that by virtue of cll 16 and 17 of the agreement, any challenges to the validity of the interim certificate should be brought before an arbitral tribunal within a further seven days after the expiration of the fourteen days after receiving the architect's decision. Learned counsel submitted that the Court of Appeal erred in its finding as the situation under cll 16 and 17 had no bearing to the situation in this case when parties had by their conduct waived their right to go to arbitration and referred their disputes to be resolved in court instead. This point of contention is better understood by reproducing the submissions of learned counsel which is along these lines:

> In the instant case both parties did not avail themselves of the statutory means to compel adherence to the contractual dispute resolution mechanism by applying for

a stay of proceedings pending arbitration before 'taking any other steps in the proceedings' pursuant to s 10 of the Arbitration Act 2005:

(a) The respondent filed its claim and the appellant responded to the claim by filing and served its defence and counterclaim without applying for a stay of proceedings pending arbitration

(b) The respondent, upon receiving the appellant's counterclaim, filed and served its Reply and Defence to Counterclaim without applying for a stay of proceedings pending arbitration.

The service of pleadings constitutes 'taking steps in the proceedings where parties would have elected and waived their right to arbitration pursuant to the Contract (see *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625).

[22] Learned counsel also argued that the certificates of the architect in this case were not intended to be final. It could be challenged in arbitration if the parties choose to go to arbitration, but crucially can similarly be challenged in court if the parties chose to come to court as they do here. Learned counsel cited the case of *Beaufort Developments (N1) Ltd v Gilbert-Ash (N1) Ltd* (1998) 59 Con LR 66 (HL) and *Robins v Goddard* [1905] 1 KB 294 as an authority for his proposition.

[23] Learned counsel further submitted that the interpretation of the courts below in respect of cll 16 and 17 had deprived the defendant of having his disputes heard in court. Further, learned counsel argued that such an interpretation as one which was accorded to by the courts below would contravene s 29 of the Contracts Act 1950. To this end, learned counsel argued that s 29 of the Contracts Act 1950 does not allow for any contractual provision which purports to forfeit one's rights to pursue legal or arbitral proceedings if the same is not commenced within a particular period as prescribed under cll 16 and 17.

[24] Learned counsel also submitted that the High Court and the Court of Appeal erred in holding that the defendant was not entitled to be compensated because there was no instruction from the defendant or PW2 as by virtue of cl 7.2 of the agreement, the contractor is to remedy the defective works within the defects liability period. Learned counsel submitted that a defects liability clause is meant to be merely an additional protection for the employer and will not affect or limit any of the employer's rights under the common law. Further, the law requires a contract to set out in clear terms if one's rights at common law are to be taken away. Clearly, learned counsel emphasised that nowhere in cl 7.2 of the agreement was it stated that this clause extinguishes the defendant's rights to damages under the Contracts Act 1950 or at common law.

[25] Learned counsel for the plaintiff conversely submitted that the courts below did not commit any error in taking the approach that the parties were bound by the terms of the contract to follow the dispute resolution process under cll 16 and 17 of the agreement. Under the said clauses, parties were required first to refer their dispute to the architect/consultant for a decision and thereafter to refer the dispute to arbitration if no decision was given by the architect/consultant within fourteen days or if either party was aggrieved by the decision. Both clauses read together provide for the legal consequence that, if the aggrieved party fails to refer the dispute on the decision of the architect/consultant to arbitration within the stipulated time, the decision shall be final and binding on the parties.

[26] Learned counsel further submitted that cll 16 and 17 of the agreement do not contravene s 29 of the Contracts Act 1950 as they provide for a two tier dispute resolution ie first to the architect/consultant and thence to a sole arbitrator. The arbitration agreement under these clauses does not impose any absolute restriction on or expressly oust the jurisdiction of the court.

[27] As for the issue of the defendant's claim for the defective works, learned counsel emphasised that on the facts and circumstances of the instant case, the learned trial judge was justified in dealing with the claim for defective works as falling under cl 7.2 of the agreement and to dismiss it on the ground that in the absence of any written instructions from the defendant or the architect ('PW2') concerning the defects or other faults in the works, this aspect of the defendant's counterclaim was clearly unfounded by virtue of cl 7.2 of the agreement.

OUR FINDINGS

[28] The issue before us is whether the High Court, as well as the Court of Appeal, had erred in interpreting the relevant provisions of the agreement. We have perused through the record of appeal and after hearing the submissions of the parties we find that the courts below did not commit any error in taking the approach that the parties are bound by the terms of the contract to follow the dispute resolution process under cll 16 and 17 of the agreement. Under the said clauses, parties are required first to refer their dispute to the architect/consultant for a decision and thereafter to refer the dispute to arbitration if no decision is given by the architect/consultant within fourteen days or if either party is aggrieved by the decision. Both clauses read together provide for the legal consequence that, if the aggrieved party fails to refer the dispute on the decision of the architect/consultant to arbitration within the stipulated time, the decision shall be final and binding on the parties.

[29] Thus, we agree with the submission of learned counsel for the plaintiff

that it would be wrong to allow the defendant to resile from the agreement and benefit from its own wrong or default in failing to refer the dispute on the decision of the architect to arbitration particularly under cll 16 and 17 of the agreement. To appreciate the salient terms of cll 16 and 17 of the agreement, we reproduce below the relevant parts of these clauses:

> SETTLEMENT OF DISPUTE
>
> 16.1 In the event of any dispute or difference arising between the Employer and the Contractor, either during the progress or after the completion of the works, or after the determination of the Contractor's engagement or breach of this agreement or the repudiation or abandonment of this agreement by either party as to -
>
> > 16 January 1 the withholding of any certificate, decision or instruction to which the Contractor may claim to be entitled to; or
> >
> > 16 January 2 the withholding of any payment to which the Contractor may claim to be entitled to under this agreement; or
> >
> > 16 January 3 any other matter arising under or, out of, or in connection with this agreement or the Works;
>
> Then such dispute or difference shall be referred to the architect/consultant for a decision.
>
> 17.1 In the event–
>
> > 17 January 1 the architect/consultant shall fail to give his decision;
> >
> > 17 January 2 either party is dissatisfied with any decision of the architect/consultant given pursuant to Clause 16.2 (such dissatisfaction shall be deemed a dispute), then the Employer or the Contractor may within a further seven (7) days after the expiration of the said 14 days after receiving the architect/consultant's decision, whichever is earlier give notice to the other party of its intention to refer the dispute or difference to arbitration (hereinafter referred to as the 'Notice of Arbitration') for decision by a sole arbitrator.

[30] Premised on cll 16 and 17 of the agreement, what the courts below did was to stop parties from going back on what they have agreed. We have no reason to disagree. In this case, cll 16 and 17 set out in clear terms the steps to be taken in case of a dispute with a specific time frame prescribed therein. Learned counsel for the defendant had raised the issue relating to the validity and enforceability of the interim certificate. With respect, we find that it is a non-issue. This is a plain case where parties are called upon to honour their part of the bargain when they entered into the agreement. The real issue here is whether the parties to a contract were in breach of the terms they have agreed to. In this regard, we agree with the views expressed by the Court of Appeal when it found it unnecessary to dwell into the validity or enforceability of the interim certificate or the decision of the architect but rather based its decision on the terms of the agreement entered into by the parties. This is clearly

reflected in the judgment of the Court of Appeal at pp 11–12 as follows:

> [24] ..... We had no issue on the law on the duties and responsibilities of an Architect/consultant as Certifier and the circumstances when an interim certificate can be challenged for invalidity. The persuasive authority in the Singapore High Court decision in *Tropicon Contractors Pte Ltd v Lojan Properties* [1989] 3 MLJ 216, cited by counsel, which lay down the law that an interim certificate issued without fulfilling stated pre-requirements would be invalid, however, was not, to our mind, of immediate relevance in view of the larger issue which became the foundation of the High Court decision, namely Juara had to be held bound by the terms of the agreement and it had failed to adhere to the dispute resolution mechanism agreed by the parties.
>
> [25] In our view, and after carefully considering appellant counsel's oral and written submissions and the submissions by respondent's counsel, we found that the high Court had not plainly erred in law, or on the facts, to warrant appellate intervention. Having concluded thus, we were not departing from the established law on the status and validity of interim certificates, and the functions and responsibilities of the architect/consultant as Certifier. The challenges to the validity of the interim certificate and the exercise of the responsibilities and duties of the architect should however have been properly brought before an arbitral tribunal as stated in the agreement.

[31] The next point we shall advert to is the contention urged upon us by learned counsel for the defendant in that the interpretation of the courts below in respect of cll 16 and 17 had deprived the defendant of having his disputes heard in court. Further, learned counsel argued that such an interpretation as one which was accorded to by the courts below would contravene s 29 of the Contracts Act. The substance of this contention is that s 29 of the Contracts Act does not allow for any contractual provision which purports to forfeit one's rights to pursue legal or arbitral proceedings if the same is not commenced within a particular period as prescribed under cll 16 and 17.

[32] We may in this connection, refer to s 29 of the Contracts Act 1950 which provides as follows:

> Agreements in restraint of legal proceedings void
>
> 29. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

[33] Upon consideration of the wordings of cll 16 and 17 of the agreement, with respect, we find that cll 16 and 17 do not contravene s 29 of the Contracts Act 1950. We are fortified in coming to this conclusion based on the fact that cll 16 and 17 of the agreement provide for a two tier dispute resolution ie in the initial level, the dispute is to be referred to the architect/consultant, and

thereafter to a sole arbitrator should there be no decision given by the architect/consultant within the stipulated time frame or if a party is aggrieved by the decision. It is pertinent to note that the arbitration agreement under these clauses does not impose any absolute restriction on or expressly oust the jurisdiction of the court. We may in this connection and by way of emphasis, reproduce below the following excerpt from Julian Bailey on *Construction Law*, Vol III, at p 1442. The eminent author on the same subject had this to say:

> 23.42 A contractual agreement for the resolution of a dispute other than by way of court proceedings may face the possibilities of being held to be unlawful, as an ouster of the court's jurisdiction. However, the circumstances in which such an agreement will be struck down depend on the precise wording of the agreement, rather than its substance. The agreement must positively purport to prevent a party from taking a justifiable matter to court. If an agreement simply provides that the parties agree to their disputes being resolved by expert determination or arbitration, that will not of itself constitute an ouster, even though the effect of such agreements is usually to prevent a party from prosecuting a claim through the courts.

[34] In the present case, the High Court rejected the defendant's claim for the amounts expended by defendant to third parties to remedy defective works because it could not show any written instructions to the plaintiff to make good the defects under cl 7.2. As regards the LAD claim, the High Court relied on the proviso to cl 6 which provides as follows:

> PROVIDED ALWAYS that the Employer shall not be entitled to claim any loss or damage under this Clause unless and until the architect/consultant shall have issued to the Employer a certificate in writing stating that in the architect/consultant's opinion the Works (or the relevant part thereof) ought reasonably to have been completed by the Completion Date or within any extended period or periods (as the case may be).

[35] We agree with the above finding of the learned trial judge as affirmed by the Court of Appeal. On the facts and circumstances of this case, the learned trial judge was justified in dealing with the claim for defective works as falling under cl 7.2 of the agreement and to dismiss it on the ground that in the absence of any written instructions from the defendant or the architect (PW2) concerning the defects or other faults in the works. Thus, this aspect of the defendant's counterclaim is clearly unfounded.

[36] In the final analysis, we would go as far to state that the defendant in this case is not in a position to resile from the terms inserted in the agreement which had imposed obligations on it. To allow it to do so would be tantamount to allowing a party in breach to take advantage of its own wrong. Parties must be held to their bargain. In our instant case, the decision of the courts below were based upon a consideration of the dispute resolution process in cll 16 and 17 of the agreement which required an initial reference to the architect/consultant

for a decision and if no decision was made by him or if either party was aggrieved by the decision, it may then refer the dispute to arbitration. The defendant failed to refer its dispute on the decision to arbitration resulting in the decision becoming 'final and binding upon the parties'. The High Court found, which we have no reasons to disagree, that the various reasons for non-payment of the interim certificate amount by the defendant were described as 'non-starters' because of the failure by the defendant to adhere to the contractual mechanism for dispute resolution. The arbitral mechanism is contemplated by the cll 16 and 17 of the agreement to which parties were bound.

[37] In light of our findings above, there is no necessity to answer any of the leave questions posed. We hereby dismiss this appeal with costs.

[38] This judgment is prepared pursuant to s 78 (1) of the Courts of Judicature Act 1964, as our learned brother Justice Apandi Ali FCJ had since resigned to take the post of the Attorney General of Malaysia.

Appeal dismissed.

Reported by Ashok Kumar